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No. 09-1195

IN THE

Supreme Court of the United States

MELISSA HARMAN AND JUSTIN OVERTON, PETITIONERS

v.

BRENT POLLOCK, OFFICER, DEPARTMENT OF PUBLIC SAFETY, STATE BUREAU OF INVESTIGATIONS, SALT LAKE CITY, UTAH; AND SCOTT BARNETT, OFFICER, DEPARTMENT OF PUBLIC SAFETY, STATE BUREAU OF INVESTIGATIONS, SALT LAKE CITY, UTAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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This Reply Brief is submitted pursuant to Rule 15, United States Supreme Court Rules.

Reply Point I

Respondents' Attempt To Portray the "Unique Facts" of This Case As Creating No Conflict With *Garrison* Should Be Rejected.

In their Opposition to the Petition for Certiorari, respondents Pollock and Barnett argue that the "unique facts" of this case justified the detention of petitioners Melissa Harman and Justin Overton for over two and one-half hours in their own home and the two searches of their home conducted during this time (Opposition at 6-8). One of the claimed unique facts is that the separateness of the garage as a distinct residence was not "unequivocally and instantly obvious" to the police during their investigation (*Id.* at 6).

There are no "unique facts" which justify the detention of Harman and Overton, or the searches of their apartment. In fact, it is hard to conceive of a set of facts more similar to *Garrison* than those of the case *sub judice*. In both cases, the officers had a warrant for a described residence, but found what appeared to be a second residence not described in the warrant. In both cases, the individual(s) described in the warrant was/were different than the person(s) found in the second apartment. In both cases, there was no separate warrant permitting search of the second apartment. In both cases , the officers immediately recognized, after entry, that they were in a second apartment. In fact, the facts in *Harman* are even stronger, as the officers

immediately saw that the Harman/Overton apartment was furnished with a kitchenette, a bathroom, a couch, a television, and a separate bedroom with a mattress on the floor (App. 46; 86). In fact, Defendant Barnett was asked at deposition when he first "knew there was a second residence." He answered, "When I walked in the back garage after they had already contained their scene, that's when I first knew." Deposition of Scott Barnett, 2/10/04, 45:8-16 (R.App. 513).

Respondents either ignored or overlooked overwhelming evidence during their investigation which should have reasonably alerted them to the fact that the outbuilding was a *separate* residence, bringing their subsequent invasion of petitioners' home in direct conflict with *Garrison's* holding:

—during their initial surveillance, SBI agents noticed that there were *two* mailboxes on the front of the main residence (App. 96). There was also a single mailbox on the outbuilding at the rear (App. 96);

—respondents' agent Joe Gomez did not look up the property's Deed of Trust. If he had performed this task during his investigation, he would have discovered that it describes the property as having *two* addresses: 41 West and 441/2 West (App. 80-81; 96);

—respondents' incomplete investigation did not discover that there was a *separate* gas account with Questar for 44 1/2 West since 1996 (App. 96);

—respondents' incomplete investigation did not discover that the U.S. Postal Service database

has a record of a *separate* address at 44 1/2 West 2700 South (App. 96);

—respondents' incomplete investigation did not discover that the phone company regularly sends its bills to 44 1/2 West as a *separate* residence (App. 96);

—the records in the County Assessor's Office showed that 44 West was actually two *separate* lots of land "divided roughly in the middle" (App. 80);

—despite distinct inquiries by the District Attorney as to whether anyone lived in the outbuilding as their residence—inquiries which should have prompted respondents to investigate further in order to establish this fact—respondent Pollock told the District Attorney that he was "not aware of any indicia of a second residence" (App. 82);

—When the SERT team began its own investigation and surveillance of the property, they saw a light next to the door to the outbuilding; they saw lights turned on there at night; they heard voices coming from the outbuilding at one point; they observed individuals coming and going from this structure; and they saw sometimes up to seven vehicles parked outside 44 West, (App. 46; 96);

—the SERT team failed to apprehend that this outbuilding had pipes coming from its roof, bespeaking a *separate* residence, not just a garage or outbuilding (App. 96);

—the SERT team did notice that this building had a door and window which were residential in character, and it had its own black metal mailbox next to the lighted door, signifying a *separate* mail delivery and a *separate* residence (App. 96);

—When the SERT team told respondent Pollock about their concern that this may be a *separate* residence unconnected to the main building, Pollock told the SERT team that he had confirmed that there was only one residence on the property (App. 84); and

—Despite respondent Pollock's assurances that there was only one residence on the property, the SERT team still regarded the outbuilding as a *separate* residence in their operations order (App. 85).

Because of the factors set forth above, the Tenth Circuit in *Harman I* held that "[e]ach of the officers had ample notice that the garage may have been a separate residence." *Harman v. Pollock*, 446 F.3d 1069, 1085. Further, 11 officers who entered the Harman/Overton residence the night of the raid described it as an "obvious apartment," a "habitated place," a "living quarters," "an apartment," a "dwelling," a "surprise," etc. (R.App. 240; 244; 251; 265; 507; 543).

These undisputed facts reasonably established the separateness of the garage as a distinct residence for purposes of applying the holding in *Garrison*. In an effort to paper over their obtuse and desultory investigation, respondents confected an amorphous "crash pad" theory to justify their invasion of petitioners' home, their detention of petitioners for

over two and one-half hours and their two searches of the home carried out during this time.

The facts which respondents possessed or should have possessed in the exercise of reasonable diligence before they entered petitioner's home were not "unique" in any regard. They converged reasonably to inform respondents that: 1) there were two separate residences on the property, 2) that petitioners, who looked totally different and had never been identified as targets in the 7-month investigation that preceded the raid, were not part of the drug dealing operation at the main house, and 3) that the warrant was overbroad. Their failure to apprehend these facts and then to search petitioners' home and detain them there on some sort of confabulated "crash pad" theory at odds with the facts before them, brings their actions into direct conflict with *Garrison's* prophylactic safeguards.

The "crash pad" exception to the Fourth Amendment, if adopted, would do real harm to the traditional Fourth Amendment analysis provided in *Garrison*. Under this theory, if the officers have any reason to suspect a connection between a so-called crash pad and the main residence, detention and searching are permitted. Of course, it would be a very unimaginative officer who could not conjure up such a possible connection. In *Garrison*, for example, the second dwelling was simply a room in Garrison's house on which there was a separate lock. If Respondent's crash pad theory were to apply, the officers in *Garrison* could have detained Garrison until they determined whether his apartment was a "crash pad" for the homeowner, or to determine if the two were somehow connected in the drug trade. If this Court allows a

crash pad exception to the Fourth Amendment, there will be no Fourth Amendment protections for separate apartments discovered during the execution of an overbroad warrant. The Tenth Circuit's decision will have effectively reversed this Court's *Garrison* decision.

Reply Point II

The Parties' Rule 56 Materials Demonstrate A Violation of *Garrison's* Holding.

Respondents point to an inadvertent omission from petitioners' Appendix of a portion of a footnote from the circuit court's opinion as an occasion for justifying the court of appeals' adoption of respondents' "crash pad" theory—and their sighting of marijuana in plain view—as an excuse for detaining petitioners as the "investigation" proceeded (*Id.* at 5).

However, this inadvertent omission does not disturb the parties' summary judgment materials which includes petitioners' probative, material evidence—identified by Circuit Judge Lucero's dissent— that "[i]nvestigating officers and SERT members executing the warrant overwhelmingly testified that [petitioners'] dwelling was clearly an apartment" and that they realized that this dwelling was *not* the garage listed in the warrant *immediately* or "within a few seconds" of when they broke down the door—and *before* they saw the small amount of marijuana and pipe in plain view (App. 28-30). The ensuing two searches and petitioners' detention were therefore accomplished without lawful authority and in violation their constitutional rights as expressed in *Garrison*.

CONCLUSION

A writ of certiorari should issue to review and vacate the judgment of the court of appeals, reaffirm *Garrison's* holding, remand the matter to the district court for further discovery and a trial on the merits of petitioners' claims; or to provide petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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